Supreme Court, U.S.
FILED

No. 95-684 OCT 27 1995

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

PAUL PLOWMAN,

Petitioner,

vs.

JOSEPH J. MASSAD, JAMES LIMESTALL, FRED LUCAS, ED GARRETT, JAMES FARLEY, BRAD HOOPES, L.D. WHITLOCK, WILLIAM SMITH, BONNIE FLANAGAN, BEULAH HOUSTON-VERNON, and DARLA SHURTZ, individually and in their Official Capacity, and their Successors,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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October 26, 1995

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Tenth Circuit correct in holding the **Reynolds v. Simms** 'one-person, one-vote' requirement to be "irrelevant" to election of the officers of a special purpose entity?

2. If **Reynolds v. Simms** 'one-person, one-vote' is not irrelevant to the election of the officers of a special purpose entity, must the entity show a justification for such deviation?

3. If a justification must be advanced by a special purpose entity for deviating from 'one-person, one-vote', is that subject to review under the 'rational basis', the 'strict scrutiny' standard or under some intermediate standard?

4. Does an administrative agency charged with regulation of the practice of dentistry throughout the State of Oklahoma exercise governmental powers of such importance that it should be considered a general governmental agency rather than a special purpose entity for determining the application of the **Reynolds v. Sims** one-person, one-vote rule to the election of its Board members?

5. Did the Tenth Circuit improperly expand and apply this Court's summary affirmance of **Sullivan v. Alabama State Bar,** 295 F.Supp. 1216 (M.D.Ala.) **aff'd without opinion** 394 U.S. 812 (1969) in a way that conflicts with this Court's more specific decisions and binding precedent?

LIST OF PARTIES

The caption contains all of the parties to the proceedings before the United States Court of Appeals for the Tenth Circuit and the United States District Court for the Western District of Oklahoma.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Paul Plowman respectfully prays that a Writ of Certiorari be issued to review the July 31, 1995, Order and Judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit entered on July 31, 1995, is reprinted as Appendix "A" hereto.

The official citation for the opinion of the Tenth Circuit in this case is: **Plowman v. Massad,** 61 F.3d 796 (10th Cir.1995).

The Order of the United States District Court for the Western District of Oklahoma entered on April 25, 1994, is reprinted as Appendix "C" hereto. There is no official citation for the District Court's Order and Judgment.

The Judgment of the United States District Court for the Western District of Oklahoma entered on April 25, 1994, is reprinted as Appendix "D" hereto.

JURISDICTION

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit was entered on July 31, 1995. No Petition for Rehearing was filed. This Petition for Writ of Certiorari was filed within ninety (90) days of the Order and Judgment of the United States Court of

Appeals for the Tenth Circuit pursuant to Rule 13.1 of the Rules of the Supreme Court. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

The original action filed in the United States District Court for the Western District of Oklahoma was for denial of the 14th Amendment guarantee of equal protection and made actionable by 42 U.S.C. §1983. Jurisdiction was vested in the district court pursuant to 28 U.S.C. §§1331, 1343(a). The judgment entered disposed of the entire action wherefore the order was final and appealable of right pursuant to 28 U.S.C. §1291. The appeal was perfected in accordance with Rule 4(a), F.R.A.P.

STATUTES AND CONSTITUTIONAL PROVISIONS

The following provisions of state statutes and of the United States Constitution are involved in the questions presented by this Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment XIV, Sec. 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RELEVANT STATUTES

Oklahoma Statutes, Title 59, Sec. 328.4:

There is hereby constituted an organization to be known as 'the Registered Dentists of Oklahoma,' hereinafter designated as 'the organization,' which shall have a seal and may sue and be sued, and which may, for the purposes of carrying into effect and promoting the objects of said organization, employ independent attorneys, may seek the advice and assistance of the Attorney General's office of the State of Oklahoma, inspectors, and investigators for the purpose of advising and assisting it in the enforcement of this act; may enter into contracts; and may acquire, hold, encumber and dispose of such real and personal property as is necessary thereto.

Oklahoma Statutes, Title 59, Sec. 328.5:

The members of the organization shall be all persons now entitled to practice dentistry in this state. Provided, however, that nothing herein contained shall be construed to prohibit the suspension or revocation of license or imposition of disciplinary measures on members thereof for causes now existing and existing at the time of the effective date of this act.

Oklahoma Statutes, Title 59, Sec. 328.7:

There is hereby constituted a Board of Governors of the organization to be known as "The Board of Governors of the Registered Dentists of Oklahoma", consisting of eight (8) dentist members, one (1) dental hygienist member and two (2) members who shall represent the public in general. One dentist member shall be elected from each of the eight districts. One dental hygienist member shall be elected by dental hygienists residing in the State of Oklahoma who are legally licensed to practice dental hygiene therein. The two public representative members

shall be appointed by the Governor, subject to confirmation by the Senate. The members representing the public may not be dentists, dental surgeons, dental hygienists or dental technicians, or be related by blood or marriage within the third degree to any such person. Each member shall hold office for a period of three (3) years and until his/her term expires and/or his/her successor is selected and qualified. Board members shall not serve for more than three (3) consecutive terms. However, upon this act becoming effective, the present members of the Board of Governors shall hold office until their terms expire and/or their successors are elected and qualified as hereinafter provided. The members of the Board of Governors shall be reimbursed for travel expenses as provided in the State Travel Reimbursement Act. The Board of Governors, at its discretion, may affiliate with the American Association of Dental Examiners as an active member and pay regular dues to said association and may send no more than two board members as delegates to regular meetings thereof.

Oklahoma Statutes, Title 59, Sec. 328.8:

For the purpose of this act, the State of Oklahoma is divided into eight geographical districts, which districts shall be designated and shall comprise the following counties to wit:

District No. 1: Cimarron, Texas, Beaver, Harper, Woods, Alfalfa, Grant, Kay, Ellis, Woodward, Major, Garfield, Noble, Dewey, Blaine, Kingfisher and Logan.

District No. 2: Tulsa and Creek.

District No. 3: Roger Mills, Custer, Beckham, Washita, Harmon, Greer, Kiowa, Caddo, Jackson and Tillman.

District No. 4: Canadian, Grady, McClain, Comanche, Cotton, Stephens, Jefferson, Garvin, Murray, Carter and Love.

District No. 5: Oklahoma.

District No. 6: Lincoln, Cleveland, Pottawatomie, Seminole, Okfuskee, Hughes, Pontotoc, Coal, Johnston, Marshall and Bryan.

District No. 7: Mayes, Wagoner, Cherokee, Adair, Okmulgee, Muskogee, Sequoyah, McIntosh, Haskell, Pittsburgh, Latimer, LeFlore, Atoka, P ..shmataha, Choctaw and McCurtain.

District No. 8: Osage, Payne, Washington, Nowata, Craig, Ottawa, Rogers, Delaware and Pawnee.

Oklahoma Statutes, Title 59, Sec. 328.9:

Nominations for dentist members of the Board of Governors from the several districts shall be by petition signed by at least ten members entitled to vote for such nominees. Nominations for the dental hygienist member of the Board of Governors shall be by petition signed by at least ten dental hygienists entitled to vote for such nominees. The election shall be by ballot. The ballots shall be mailed to those entitled to vote at least thirty (30) days prior to the date of canvassing the ballots and shall be returned by mail to the secretary and the ballots shall be opened and canvassed at a meeting of the Board. In other respects, the election shall be as the board may by rule direct. Only members of the organization residing in the respective districts shall be entitled to vote for the dentist members therefrom. Only dental hygienists residing and licensed in the State of Oklahoma shall be entitled to vote for the dental hygienist member. Dentist members of the Board of Governors may be removed from office by special election called by the Board of Governors upon receipt of a written petition signed by at least twenty percent (20%) of the members residing in that district. The dental hygienist member of the Board of Governors may be removed from office by special election called by the Board of Governors upon receipt of a

written petition signed by at least twenty percent (20%) of the licensed dental hygienists residing in the State of Oklahoma. If a majority of the votes cast in the special election are in favor of recalling the board members, he/she will be removed from office as of the date of the results of the ballot canvassing are forwarded to the Board of Governors.

Oklahoma Statutes, Title 59, Sec. 328.10:

The officers of the organization shall be a president, first vice-president, second vice-president, and a secretary-treasurer. The duties of said officers shall be prescribed by the Board of Governors. Provided that at the will of the Board, the secretary-treasurer may be one and the same person. The president, vice-presidents and secretary-treasurer shall assume the duties of their respective offices at the conclusion of the meeting at which they are elected. The term of office shall be for one (1) year. An annual meeting shall be held at a time and place designated by the Board of Governors.

Oklahoma Statutes, Title 59, Sec. 328.13:

A vacancy among the dentist members on the Board of Governors shall be filled by a special election in the district of the vacancy for the unexpired term within sixty (60) days after the vacancy occurs, as provided in Section 328.9 of this title. Nomination shall be made in the same manner as provided in Section 328.9 of this title, or if no one is nominated within forty-five (45) days from date of vacancy said vacancy shall be filled by appointment by the Board of Governors. A vacancy among the public representative members on the Board of Governors shall be filled by appointment by the Governor, subject to confirmation by the Senate.

Oklahoma Statutes, Title 59, Sec. 328.15:

The organizations shall be governed by the Board of Governors which shall have the power and duties conferred in the State Dental Act. In addition thereto, the Board of Governors shall have the power and authority to promulgate rules and regulations to carry out the provisions of the State Dental Act as it deems necessary and proper to protect the dental health of the public. Further, the Board of Governors shall be charged with:

1. The executive functions of the organization; and

2. Examinations of all candidates; and

3. Enforcement of the provisions of the State Dental Act; and

4. The inspection of dental offices and dental laboratories; and

5. The establishment of minimum standards of dental care by cooperating with the Office of Public Affairs and other state and federal departments, who maintain dental facilities or offer dental care to persons in the various state and federal institutions. The Board may enter into cooperative contracts or agreements with another state or combination of states for purposes of formulating and conducting regional simultaneous examinations, such as the Central Regional Dental Testing Service, Inc., or successor entity or comparable entities. The Board of Governors, on or before October 1 of each year, shall establish or set, within limits prescribed in the State Dental Act, all fees to be collected pursuant to the State Dental Act.

STATEMENT OF THE CASE

The Petitioner, Dr. Paul Plowman, is a licensed dentist whose professional practice is primarily in Oklahoma County, Oklahoma.

Dr. Plowman's professional practice is regulated by the Board of Governors of Registered Dentists of Oklahoma which is composed of eleven (11) members. Eight (8) of these board members are dentists selected from each of eight (8) geographic districts in Oklahoma and elected by the dentists located in those districts.

Dr. Plowman filed suit claiming a 14th Amendment equal protection violation because these eight districts contain widely different numbers of eligible voters such that Dr. Plowman's vote counts only one-ninth as much as dentists in other, less populous districts. The Respondents (hereafter 'Board') claimed that the Board is a special function governmental unit and therefore exempt from the one-person, one-vote requirement of the Fourteenth Amendment. Dr. Plowman responded that even viewed as a special purpose agency, the Board was required to justify its classification of dentists into districts which resulted in substantial dilution of voting rights based on accidents of geography and that the Board had failed to set out even a rational basis for its district organization.

All parties moved for summary judgment and the trial court granted summary judgment in favor of the Board finding that the Board was a special function governmental unit and not subject to the one-person, one-vote rule. The trial court did not address Dr. Plowman's arguments that even as a special purpose governmental

unit, there must be at least a rational – if not a compelling – governmental purpose served by the challenged classification.

From the order granting summary judgment, Dr. Plowman timely appealed.

The Tenth Circuit of the United States Court of Appeals in a published opinion entitled **Plowman v. Massad, et al,** 61 F.3d 796 (10th Cir.1995) affirmed the trial court's decisions. The Tenth Circuit rejected Dr. Plowman's claim that even a special purpose district must set out a justification for according some persons greater voting powers than other persons. The Circuit gave controlling weight to the summary affirmance of a district court decision and declined to follow more recent statements of the United States Supreme Court regarding the standards application to determining (a) what constitutes a special purpose district and (b) when a special purpose district can provide for unequal voting rights.

For that decision, Petitioner seeks review by this Court.

REASONS FOR GRANTING THE WRIT

The reasons for granting review of the District Court and Court of Appeals for the Tenth Circuit are as follows:

The Court of Appeals for the Tenth Circuit has decided an important question of federal law in a way that conflicts with applicable decisions of this Court and has addressed novel and important questions of equal

protection analysis which have not been, but which should be settled by this Court.

As a published opinion, the standards improperly announced by the Tenth Circuit are likely to shape legislatively action at the state and local level for not only the governments within that circuit but, to a degree, for governmental decisions on a nation-wide basis. By holding that 'one-person, one-vote' considerations are "irrelevant" as to a special or limited purpose governmental entity, the decision invites the formation of governmental units whose elected officials exercise substantial and important powers but whose officials are subject to election schemes which irrationally and arbitrarily discriminate between the rights of equally affected constituents.

This represents a fundamental erosion of the **Reynolds v. Sims** doctrine capable of substantially undermining the effectiveness of the 'one-person, one-vote' principle of government.

Because this is a matter of special and important consideration to the organization and operation of government, this Court should review the issue by the grant of the a writ of certiorari.

These questions presented in this petition are as follows:

1. – 'Reynolds v. Simms' is not irrelevant to 'special purpose' entities.

The Tenth Circuit has held that the 'one-person, one-vote' doctrine of **Reynolds v. Simms,** 377 U.S. 533 (1964) is "irrelevant" to special purpose districts. This statement

appears to conflict with this Court's express holding in **Quinn v. Millsap,** 491 U.S. 95, 104-105 (1989) which expressly rejected the conclusion "that the Equal Protection Clause was irrelevant" to a special purpose or limited function governmental entity. In **Lockport v. Citizens For Community Action,** 430 U.S. 259, 266 (1977) this Court held that a deviation from the 'one-person, one-vote' rule was appropriate "to give greater influence to the constituent groups found to be most affected by the governmental unit's functions". "Presumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting". **Phoenix v. Kolodziejsk,** 399 U.S. 204, 209 (1970). "[S]tate and local elections are subject to *the general rule of population equality between electoral districts.*" **NYC Board of Estimate v. Morris,** 489 U.S. 688, 692-93 (1989). This would appear to be a fairly clear statement that the 'one-person, one-vote' doctrine is not irrelevant but rather is the starting point for an equal protection analysis of any legislative scheme which provides disproportionate voting rights to certain select groups within the general electorate.

Thus, the Tenth Circuit's statement that the 'one-person, one-vote' doctrine is "irrelevant" to special purpose entities appears contrary to the applicable decisions of this Court. To the extent the decisions of this Court have not settled the question of whether 'one-person, one-vote' is "irrelevant" to to special function government entities, this is an important and far-reaching question which should be directly addressed.

2. – Even A Special Purpose Governmental Entity Must Justify A Departure From The 'One-Person, One-Vote' Rule.

This Court has expressly held that classifications affecting the rights of citizens " 'must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' " **Eisenstadt v. Baird,** 405 U.S. 438, 447 (1972) **quoting Royster Guano Co. v. Virginia,** 253 U.S. 412, 415 (1920).

By holding the 'one-person, one-vote' doctrine irrelevant to special purpose entities, the Tenth Circuit ignored the decisions of this Court which require that all Equal Protection issues be analyzed by requiring there to be some relationship between the classification at issue and the purpose being advanced to justify the classification.

3. – Departure From The 'One-Person, One-Vote' Rule Should Be Subject To Strict Scrutiny.

In fairness the Tenth Circuit did not reach this issue because of its primary holding that the 'one-person, one-vote' doctrine was irrelevant. It may be most appropriate to remand this issue to the Tenth Circuit for proper consideration in the first instance.

It should be clear, however, that the decisions of this court hold that "rights of voters are fundamental". **Anderson v. Celebrezze,** 460 U.S. 780, 788 (1983). For this reason, schemes which dilute the voting power of certain groups of citizens are subject to "close scrutiny". **Kramer v. Union Free Sch. Dist.,** 395 U.S. 621, 627 (1969).

4. – The Oklahoma Dental Board Should Be Considered To Exercise Important Governmental Powers.

The Tenth Circuit agreed with the trial court that the Dental Board was a 'special purpose entity' but did not explain its reasoning nor identify the factual predicate for that holding.

The Tenth Circuit appeared to base its holding on the sole factor that the powers of the Board were limited to the regulation of one profession, i.e.: dentistry. The decisions of this Court make it clear, however, that the proper test is not the range of power but rather whether the entity's activities implicate "a traditional element of governmental sovereignty." **Ball v. James,** 451 U.S. 355, 368 (1981) (also describing the test as whether the powers exercised are "normal functions of government" **id.,** 451 U.S. at 366).

Thus, the Tenth Circuit failed to apply the proper analysis set out by this Court in that it focused on the range of powers rather than the character of those powers. To the extent, however, that this issue is not clearly settled by the decisions of this Court, the test for determining whether an entity should be characterized as a "special purpose entity" or a "unit of general government" is an important question having broad implications and should be directly addressed by this Court.

5. – The Tenth Circuit Improperly Expanded The Application of *Sullivan v. Alabama State Bar*.

In giving controlling affect to this Court's summary affirmance of **Sullivan v. Alabama State Bar,** 295 F.Supp. 1215 (M.D.Ala), **aff'd without opinion** 394 U.S. 812 (1969)

the Tenth Circuit ignored the applicable decisions of this Court regarding the proper effect of summary affirmances and departed from proper judicial procedure to a degree warranting the exercise of this Court's power of supervision.

This Court has explained that "[w]hen we summarily affirm, without opinion, the judgment of a three-judge District Court we affirm the judgment but not necessarily the reasoning by which it was reached." **Fusari v. Steinberg,** 419 U.S. 379, 391-392 (1975) (Burger, C.J., concurring). Thus, "limited precedential effect [is] to be accorded summary dispositions." **Anderson v. Celebrezze,** 460 U.S. 780, 784 & n. 5 (1983).

In **Sullivan** the powers of the entity in question were "classed as judicial". 295 F.Supp. at 1222. **Sullivan** thereafter appears to fall within the group of lower court decisions which have carved out an exception for the judiciary from the general 'one-person, one-vote' rule. **Accord Latin American Citizens Council #4434 v. Clements,** 914 F.2d 620, 627 (5th Cir.1990); **Concerned Citizens v. Pine Creek Conservancy,** 473 F.Supp. 334 (S.D.Ohio 1977) and **Wells v. Edwards,** 347 F.Supp 453 (M.D.La. 1972) **aff'd** 409 U.S. 1095.

It is undisputed, however, that the Respondent Board exercises broad administrative functions which encompass legislative and executive duties such as the making and enforcement of rules and the assessment, collection and expenditure of revenues. This Court has refused to distinguish between "elections for 'legislative' officials and those for 'administrative' officials" in applying the one-person, one-vote doctrine. **Hadley v. Junior College**

District, 397 U.S. 50, 56-57 (1970). Rather, "where a State provides for an election of a local official or agency – whether administrative, legislative or judicial – the requirements of **Gray v. Sanders** and **Reynolds v. Sims** must be met." **Sailors v. Kent Board of Ed.,** 387 U.S. 105, 111 (1967).

Thus, the Tenth Circuit departed from proper judicial practice by extending the application of **Sullivan** beyond even the reasoning advanced in that case and by giving that decision an effect which is contrary to the decisions of this Court.

CONCLUSION

As a published opinion, the standards improperly announced by the Tenth Circuit are likely to shape legislatively action at the state and local level for not only the governments within that circuit but, to a degree, for governmental decisions on a nation-wide basis. Because important rights of voter equality are impacted by the scope and nature of the special purpose entity doctrine, this is a matter of special public importance. For the foregoing reasons, Petitioner asks this Court to grant the Petition for Writ of Certiorari and thereupon review and correct the decision of the Tenth Circuit.

Respectfully submitted this 26th day of October, 1995.

MARK HAMMONS
Attorney for Petitioner

APPENDIX

A. Order and Judgment of the United States Court of Appeals for the Tenth Circuit A-1

B. Notice of Appeal B-1

C. Order of the United States District Court for the Western District of Oklahoma C-1

D. Judgment of the United States District Court For the Western District D-1

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

PAUL PLOWMAN, D.D.S., Plaintiff-Appellant, v. JOSEPH J. MASSAD, JAMES LIMESTALL, FRED LUCAS, ED GARRETT, JAMES FARLEY BRAD HOOPES, L.D. WHITLOCK, WILLIAM SMITH, BONNIE FLANAGAN, BEULAH HOUSTON-VERNON, and DARLA SHURTZ, individually and in their Official Capacity, and their Succcessors, Defendants-Appellees.	)	No. 94-6182 (Filed Jul. 31, 1995)

Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. CIV-93-1008-C)

Mark Hammons of Hammons & Associates, Oklahoma City, Oklahoma, for Plaintiff-Appellant.

W. Craig Sutter, Assistant Attorney General of Oklahoma (Susan B. Loving, Attorney General of Oklahoma, with him on the brief) Oklahoma City, Oklahoma, for Defendants-Appellees.

Before ANDERSON, Circuit Judge, and MCWILLIAMS, Senior Circuit Judge, and BROWN, Senior District Judge.*

MCWILLIAMS, Senior Circuit Judge.

This appeal concerns a constitutional challenge to the Board of Governors of the Registered Dentists of Oklahoma. By statute, the legislature of the State of Oklahoma created an organization known as "the Registered Dentists of Oklahoma," whose membership consisted of all persons entitled to practice dentistry in Oklahoma as of the date of the enacting statute. 59 Okla. Stat. §§ 328.4-.5 (1989).

By statute, the legislature created a governing body of the Registered Dentists of Oklahoma, described in the statute as "the Board of Governors of the Registered Dentists of Oklahoma." 59 Okla. Stat. § 328.7 (1989). The Board of Governors of the Registered Dentists of Oklahoma ("the Board") consists of eleven persons, eight of whom are dentist members, one of whom is a dental hygienist member, and two of whom are neither dentists nor hygienists and are to represent the "public in general." The one dental hygienist member of the Board is elected by all licensed dental hygienists residing in Oklahoma. The two public representative members of the Board are appointed by the Governor, subject to confirmation by the state senate.

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* Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, sitting by designation.

The eight dentist members are elected by geographical districts. For the purposes of what is known as the "Oklahoma Dental Act," the legislature created eight geographical districts. 59 Okla. Stat. § 328.8 (1989). The licensed dentists of each district elect one licensed dentist from that district to serve on the Board. The fact that the eight districts have varying numbers of dentists residing therein forms the springboard for the present constitutional challenge to the Board. In this regard, it is agreed that the eight districts created by the state legislature have the following number of dentists residing therein:

District 1	–	128 dentists
District 2	–	367 dentists
District 3	–	57 dentists
District 4	–	160 dentists
District 5	–	515 dentists
District 6	–	164 dentists
District 7	–	158 dentists
District 8	–	120 dentists

Dr. Paul Plowman, the plaintiff in the district court and appellant in this court, is a member of the Registered Dentists of Oklahoma and resides in District 5. As above indicated, District 5 consists of 515 dentist members of the Registered Dentists of Oklahoma. Those 515 dentists elect one dentist from within their district to the Board of Governors. By way of example, District 3 consists of only 57 dentist members of the Registered Dentists of Oklahoma, yet those 57 dentists also elect one dentist from within their district to the Board. Therein lies our present problem.

Dr. Plowman brought the present action in the United States District Court for the Western District of

Oklahoma, naming as defendants the eleven members of the Board of Governors, "individually and in their official capacity, and their successors." The action was characterized as one "for deprivation of equal protection of the law as guaranteed by the Fourteenth Amendment and as made actionable by 42 U.S.C. § 1983."

In his complaint Dr. Plowman alleged, in essence, that under the statutory scheme for electing dentist members to the Board of Governors he was denied equal protection of the law because his vote was "diluted" and did not "count" as much as the vote of a dentist member residing, for example, in District 3. By way of relief, Dr. Plowman sought a declaration that the statutes creating the Board of Governors were unconsitutional and that accordingly the Board itself is unconstitutional.

The defendants filed an answer, and both plaintiff and the defendants moved for summary judgment. After hearing, the district court denied Dr. Plowman's motion and granted the defendants' motion, and entered judgment in favor of the defendants. Dr. Plowman appeals. We affirm.

Dr. Plowman's basic position on appeal is that the eight geographical electoral districts created by the Oklahoma Dental Act from which the eight dentist members of the Board of Governors of the Registered Dentists are elected violates the equal protection clause of the Fourteenth Amendment because of the disparity in the number of dentists residing in the eight districts. In thus arguing, Dr. Plowman relies on the "one person, one vote" rule set forth in *Reynolds v. Sims*, 377 U.S. 533 (1964), and its progeny.

The defendant board members argue that theirs is a "special purpose" board and constitutes an exception to the one person, one vote rule, and in thus arguing rely on such cases as *Ball v. James*, 451 U.S. 355 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973); and *Sailors v. Board of Educ.*, 387 U.S. 105 (1967). In this regard, Dr. Plowman replies that even if the defendant Board be one for a "special purpose," as opposed to a "general purpose," there still must be at least some "rational reason" for creating eight electoral districts containing a disparate number of dentists residing therein.

As indicated, the district court granted the defendants' motion for summary judgment and entered judgment on behalf of all defendants. In so doing, the district court found that the Board of Governors of the Registered Dentists of Oklahoma "functions as a special purpose unit of government" and hence was not subject to the one person, one vote rule.

On appeal, we reach the same result as the district court did. At the outset, we note that most of the cases relied on by both parties have facts different, in several respects, from those in the instant case. The case which most closely resembles the instant case is *Sullivan v. Alabama State Bar*, 295 F. Supp. 1216 (M.D.Ala.), *aff'd without opinion*, 394 U.S. 812 (1969).

In *Sullivan*, the State Legislature of Alabama established a Board of Commissioners of the Alabama State Bar consisting of 36 members, one elected from each of the 36 state judicial circuits by the attorneys residing therein. An attorney challenged the consitutionally of this

scheme of electing members to the Board of Commissioners because there admittedly were wide variances amoung the 36 judicial circuits both in total population and in the number of licensed attorneys residing therein. The three-judge court in *Sullivan* rejected this argument and in so doing spoke as follows:

> Finally, this case might be more briefly and properly disposed by laying aside all procedural obstacles and deciding Sullivan's federal constitutional claims. He asks this Court to extend the "one man, one vote" requirement far beyond the holdings of the Supreme Court in *Reynolds v. Sims*, 1964, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, and *Avery v. Midland County, Texas*, 1968, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45. The Supreme Court has held that the "one man, one vote" principle has no relevancy to the choice of members of a county school board, a non-legislative office. Lower courts have reached the same result as to various governing bodies of limited-purpose districts and as to members of the executive or judicial branch. As has been indicated, the powers of the Board of Commissioners here under attack may more accurately be classed as judicial than as legislative. If there is any unjust malapportionment, it can be corrected by the State Legislature, which itself is no longer afflicted with the malady of malapportionment. *We hold that the constitutional principle of "one man, one vote" has not relevancy to the Board of Commissioners of the Alabama State Bar.* (emphasis added). (footnotes omitted).

Sullivan v. Alabama State Bar, 295 F. Supp. at 1222.

As indicated, on appeal the Supreme Court in *Sullivan* granted a motion to affirm and affirmed, without comment, the three-judge district court.[1]

On the basis of *Sullivan*, we affirm the judgment of the district court in the instant case. The instant case is, in our view, on all fours with *Sullivan*.[2] The Board of Governors of the Registered Dentists of Oklahoma is in the same position as the Board of Commissioners of the Alabama State Bar in *Sullivan*.

Judgment affirmed.

---

[1] In *Hicks v. Miranda*, 422 U.S. 332, 344, the Supreme Court quoted with approval Justice Brennan's statement in *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959) that "[v]otes to affirm summarily, . . . it hardly needs comment, are votes on the merits of a case. . . . " In a concurring opinion in *Fusari v. Steinberg*, 419 U.S. 379, 391, (1975), Chief Justice Burger said that "[w]hen we summarily affirm, without opinion, the judgment of a three-judge District Court we affirm the judgment but not necessarily the reasoning by which it was reached." In *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983), the Supreme Court said that "[w]e have often recognized that the precedential effect of a summary affirmance extends no further than 'the precise issues presented and necessarily decided by those actions.' " The "precise issue" in *Sullivan*, as we see it, was whether the one person, one vote rule applied to the Board of Commissioners of the Alabama State Bar.

[2] We note that in *Brady v. State Bar of California*, 533 F.2d 502, 502-03 (9th Cir. 1976), the Ninth Circuit, citing *Sullivan*, stated that "[t]he Supreme Court has held that malapportionment of representation on a state bar governing body is not a violation of fourteenth amendment rights."

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

PAUL PLOWMAN, D.D.S., Plaintiff,	)	No. CIV-93-1008-C
v.	)	
JOSEPH J. MASSAD, JAMES LIMESTALL, FRED LUCAS, ED GARRETT, JAMES FARLEY, BRAD HOOPES, L.D. WHITLOCK, WILLIAM SMITH, BONNIE FLANAGAN, BEULAH HOUSTON-VERNON and DARLA SHURTZ, individually and in their official capacities, and their successors, Defendants.	)	

NOTICE OF APPEAL

(Filed May 4, 1994)

COMES NOW THE PLAINTIFF and hereby gives notice of his appeal from the judgment entered in favor of the Defendants JOSEPH J. MASSAD, JAMES LIMESTALL, FRED LUCAS, ED GARRETT, JAMES FARLEY, BRAD HOOPES, L.D. WHITLOCK, WILLIAM SMITH, BONNIE FLANAGAN, BEULAH HOUSTON-VERNON and DARLA SHURTZ, individually and in their official capacities, and their successors, and against the Plaintiff, PAUL PLOWMAN, D.D.S., on April 25, 1994.

Respectfully submitted this 4th day of May, 1994.

/s/ Mark Hammons
HAMMONS & ASSOCIATES, INC.
MARK HAMMONS OBA # 3784
401 N. HUDSON, LOWER LEVEL
OKLAHOMA CITY, OK 73102

CERTIFICATE OF MAILING

A true copy of the foregoing was mailed to opposing counsel Rob Ramana, Assistant Attorney General, 2300 North Lincoln Blvd., Room 112, Oklahoma City, Oklahoma 73105, on the same date as its filing with this Court.

/s/ Mark Hammons

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

PAUL PLOWMAN, D.D.S., Plaintiff,	)	No. CIV-93-1008-C
vs.	)	
JOSEPH J. MASSAD, JAMES LIMESTALL, FRED LUCAS, ED GARRETT, JAMES FARLEY, BRAD HOOPES, L.D. WHITLOCK, WILLIAM SMITH, BONNIE FLANAGAN, BEULAH HOUSTON-VERNON and DARLA SHURTZ, individually and in their official capacities, and their successors, Defendants.	)	

ORDER

(Filed Apr. 25, 1994)

This matter is before the Court for consideration of the motion for summary judgment filed by defendants, the Oklahoma Board of Governors of Registered Dentists, individually and in their official capacities. Plaintiff has responded and also requests summary judgment. The parties agree the material facts are not in dispute.

Undisputed Facts

1. The Oklahoma Dental Act, 59 Okla. Stat. §§ 328.1, *et seq.*, establishes an organization known as the "Registered Dentists of Oklahoma." The Registered Dentists of Oklahoma consist of those individuals licensed to practice dentistry in Oklahoma. The Dental Act also establishes a governing body for this organization, "The Board of Governors of Registered Dentists of Oklahoma" ("Board").

2. The Board is composed of 11 members, of whom eight are dentists elected by the membership of the Registered Dentists of Oklahoma from eight geographic districts. The Board also includes one dental hygienist member, and two members who represent the public in general.

3. To be a candidate for election, a dentist must reside in the district and secure a nominating petition signed by at least ten other dentists residing in the district. Only dentists residing within the defined geographic district can vote for the Board representative from that district.

4. A Board member may be recalled pursuant to a recall petition signed by 20% of the dentists eligible to vote in that district. No grounds for recall are necessary and recall will be accomplished if a majority of dentists voting in the recall election approve that action.

5. The Board is charged with the responsibility of examining candidates for licensure as dentists and as dental hygienists, enforcing the provisions of the Dental Act, and inspecting dental offices and dental laboratories.

Other powers of the Board include the power to sue and be sued, to employ attorneys, to obtain Attorney General opinions, to hire inspectors and investigators, to enter into contracts, to acquire, hold, encumber and dispose of real and personal property, to pay travel expenses, to affiliate with professional organizations, to promulgate rules and regulations, to enforce the penal provisions of the Dental Act, to establish minimum standards of dental care, to enter into cooperative agreements with other agencies and other states, to appoint committees and examining boards, to hire employees, to pay expenses, to establish continuing education requirements, to fix fees for examinations, permits, licenses and registration, to discipline dentists and hygienists, and to seek injunctions against the unlicensed practice of dentistry.

6. The provisions of the Dental Act impose limits on the Board's exercises of its powers and responsibilities. The Dental Act defines the practice of dentistry and dental hygiene, establishes rules of professional conduct for dentists and dental hygienists, and specifies the grounds for disciplinary action against dentists and dental hygienists. The Dental Act also establishes limits on the fees that the Board may establish for applications for licensure and for renewal of licensure. In addition, the Dental Act establishes procedures for disciplinary hearings against dentists and for appeals from a Board decision imposing discipline. The Board's decision to impose disciplinary actions may be appealed to Oklahoma County District Court and subsequently to the Oklahoma Supreme Court. In its sole discretion, the Board may enforce or not enforce any provision of the Dental Act. The Board is equally empowered to determine what punishment, if

any, will be imposed for any violation. Punishment may include revocation or suspension of a dental license, probation, and public or private reprimand.

7. As an administrative agency, the Board is subject to certain provisions of the Administrative Procedures Act. 75 Okla. Stat. §§ 250, *et seq.*

8. Under the Administrative Procedures Act, the Board's rules must be submitted to the Governor, to the Speaker of the House of Representatives, and the President Pro Tempore of the Senate. The Board's rules are not valid and effective until approved by either the Governor or a Joint Resolution of the Legislature.

9. The plaintiff is Dr. Paul Plowman, a licensed dentist and member of the Registered Dentists of the State of Oklahoma.

10. Dr. Plowman lives and practices dentistry within Oklahoma County, Oklahoma, which is in the Board's District 5.

11. The numbers of licensed dentists in the eight districts are as follows: District 1 - 128, District 2 - 367, District 3 - 57, District 4 - 160, District 5 - 515, District 6 - 164, District 7 - 158, and District 8 - 120.

12. Each of the eight districts elects one Board member regardless of the number of dentists eligible to vote within such districts.

Standard of Review

A party resisting a motion for summary judgment must do more than make conclusionary allegations, he

"must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Dart Industries, Inc. v. Plunkett Co.*, 704 F.2d 496, 498 (10th Cir. 1983); *see Lake Hefner Open Space Alliance v. Dole*, 871 F.2d 943, 946 (10th Cir. 1989) (plaintiff did not "by affidavits or . . . otherwise . . . set forth *specific* facts showing that there is a genuine issue for trial." (emphasis supplied)). The mission of the summary judgment procedure is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Advisory Committee Note to Fed. R. Civ. P. 56(e)). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party there is no 'genuine issue for trial'," and summary judgment can be granted. *Id.* at 587 (citation omitted). The burden on the moving party is only to point out that the records do not disclose a genuine issue on any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). It is sufficient to discharge the moving party's burden by showing the record does not contain a material issue and point out the part of the record supporting the assertion. Where, as here, the non-moving party has the burden of proving at trial the material issues, then the moving party is not required to "support its motion with affidavits or other similar materials *negating* the opponent's claim." *Id.* at 323. It is enough to show "that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

There is no need for the submission of additional evidence or an evidentiary hearing as plaintiff has suggested because the material facts are not in dispute. Once

the Board, as the moving party, points out the absence of evidence to create a "genuine issue" of a "material fact" on which the non-moving party bears the burden of proof at trial, the Supreme Court imposes a burden on the non-moving party. Plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. The non-moving party must set forth specific facts showing there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Although the Court will construe the facts and inferences drawn from the record before it in the light favoring the non-movant, "[e]ven under this standard there are cases where the evidence is so weak that the case does not raise a genuine issue of fact." *Burnette v. Dow Chemical Co.*, 849 F.2d 1269, 1273 (10th Cir. 1988). The question in a case for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

Discussion

This action involves a constitutional challenge to the Board's election process. Under the Dental Act, 59 Okla. Stat. §§ 328.1, *et seq.*, Oklahoma is divided into eight geographical districts. 59 Okla. Stat. § 328.7. Some districts encompass as few as two counties. District One has the most and covers 17 counties. 59 Okla. Stat. § 328.8. Each district may elect one Board member. 59 Okla. Stat. § 328.8. Plaintiff alleges the Board's election process violates the Fourteenth Amendment to the United States

Constitution, which guarantees, among other things, each citizen is entitled to equal protection under the laws.

An important distinction in the pertinent cases is whether an election is accomplished by general popular vote or by some other means. If the controversy concerns a governmental unit exercising general governmental functions, votes may only be cast based on an apportionment of the population. *Reynolds v. Simms*, 377 U.S. 533 (1964). Elections by other means have been upheld. *Sailors v. Bd. of Educ. of Kent County*, 387 U.S. 105 (1967) (local school board delegates elected the members of the county school board); *Rosenthal v. Bd. of Educ. of Central High School Dist. No. 3 of Town of Hempstead*, 385 F.Supp. 223 (E.D. N.Y. 1974) *aff'd*, 420 U.S. 985 (1975) (local board members elected the central school boad members); *Benner v. Oswald*, 592 F.2d 174 (3d Cir.), *cert. denied*, 444 U.S. 832 (1979) (election of a university's trustees).

In *Hadley v. Junior College Dist. of Metropolitan Kansas City, Mo.*, 397 U.S. 50 (1970), the Supreme Court announced that the general principle of one man, one vote does not apply to special purpose units of government. Although the Board is a unit of government, the restrictions on its exercise of power clearly make it a special purpose unit, and thus the apportionment requirement of the *Reynolds* line of cases is inapplicable here. The Board may determine the fee for a dental license and may regulate the practice of dentistry and dental hygiene. Although the Board is responsible for any disciplinary action against a licensed dentist, any such action by the Board is subject to review under the Administrative Procedures Act, 75 Okla. Stat. §§ 250, *et seq*. This Court finds the Board's actions are sufficiently restricted

by the provisions of the Dental and Administrative Procedures Acts that it functions as a special purpose unit of government. Accordingly, the fact that the Board is selected by a means other than a general election does not violate plaintiff's right to equal protection under the laws. The Board's motion for summary judgment will be granted and plaintiff's motion for summary judgment will be denied.

Conclusion

In accordance with the foregoing, the Board's motion for summary judgment is GRANTED, and the plaintiff's motion for summary is DENIED. A judgment shall enter accordingly.

IT IS SO ORDERED this 25 day of April, 1994.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES
DISTRICT JUDGE

ENTERED IN JUDGEMENT DOCKET ON
4-25-94

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

PAUL PLOWMAN, D.D.S., Plaintiff,	)	No. CIV-93-1008-C
vs.	)	
JOSEPH J. MASSAD, JAMES LIMESTALL, FRED LUCAS, ED GARRETT, JAMES FARLEY, BRAD HOOPES, L.D. WHITLOCK, WILLIAM SMITH, BONNIE FLANAGAN, BEULAH HOUSTON-VERNON and DARLA SHURTZ, individually and in their official capacities, and their successors, Defendants.	)	

JUDGMENT

(Filed Apr. 25, 1994)

Upon consideration of the pleadings herein, the Court finds that defendants' Motion for Summary Judgment should be granted, and judgment is therefore entered on behalf of all defendants.

DATED this 25 day of April, 1994.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES
DISTRICT JUDGE

ENTERED IN JUDGEMENT DOCKET ON
4-25-94

Supreme Court, U.S.
FILED
NOV 27 1995
CLERK

No. 95-684

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

PAUL PLOWMAN,
Petitioner,

versus

JOSEPH J. MASSAD, JAMES LIMESTALL, FRED LUCAS, ED GARRETT, JAMES FARLEY, BRAD HOOPES, L.D. WHITLOCK, WILLIAM SMITH, BONNIE FLANIGAN, BEULAH HOUSTON-VERNON, and DARLA SHURTZ, individually and in their Official Capacities, and their Successors,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA

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November 27, 1995

BEST AVAILABLE COPY

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Tenth Circuit Court of Appeals correct in holding that the *Reynolds v. Sims*, 377 U.S. 533 (1964), *reh'g denied*, 379 U.S. 870 (1964) "one person, one vote" rule is "irrelevant" to election of the officers of a special purpose governmental entity?

2. If the *Reynolds v. Sims* "one person, one vote" rule is not irrelevant to the election of the officers of a special purpose governmental entity, must the governmental entity show a justification for not applying the rule?

3. If a justification must be advanced by a special purpose governmental entity for deviating from the "one person, one vote" rule, is that subject to review under the "rational basis" standard, the "strict scrutiny" standard, or some intermediate standard?

4. Does an administrative agency charged with regulation of the practice of dentistry throughout the State of Oklahoma exercise governmental powers of such importance that it should be considered a general governmental agency rather than a special purpose entity for determining the application of the *Reynolds v. Sims* "one person, one vote" rule to the election of its Board members?

5. Did the Tenth Circuit improperly expand and apply this Court's summary affirmance of *Sullivan v. Alabama State Bar*, 295 F.Supp. 1216 (M.D. Ala. 1969) *aff'd without opinion* 394 U.S. 812 (1969) in a way that conflicts with this Court's more specific decisions and binding precedent?

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS AND JUDGMENTS BELOW

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STATUTORY PROVISIONS INVOLVED

Okla. Stat. tit. 59, § 328.2:

The practice of dentistry in the State of Oklahoma is hereby declared to affect the public health, safety and general welfare and to be subject to regulation and control in the public's best interest. It is further declared to be a matter of public interest and concern that the dental profession, through advancement and achievement, merits and receives the confidence of the public and that only properly qualified dentists be permitted to practice dentistry and supervise dental assistants and/or dental nurses in the State of Oklahoma. All provisions of this act relating to the practice of dentistry, the practice of dental hygiene, the procedures performed by dental assistants and/or dental nurses, and the fabrication of dental appliances in dental laboratories by dental laboratory technicians shall be liberally construed to carry out these objects and purposes.

Okla. Stat. tit. 59, § 328.7:

There is hereby constituted a Board of Governors of the organization to be known as "The Board of Governors of the Registered Dentists of Oklahoma," consisting of eight (8) dentist members, one (1) dental hygienist member and two (2) members who shall represent the public in general. One dentist member shall be elected from each of the eight districts. One dental hygienist member shall be elected by dental hygienists residing in the State of Oklahoma who are legally licensed to practice dental hygiene therein. The two public representative members shall be appointed the Governor, subject to confirmation by the Senate. The members representing the public may not be dentists, dental surgeons, dental hygienists or dental technicians, or be related by blood or marriage within the third degree to any such person. Each member shall hold office for a period of three (3) years and until his/her term expires and/or his/her successor is selected and qualified. Board members shall not serve for more than three (3) consecutive terms. However, upon this act becoming effective, the present members of the Board of Governors shall hold office until their terms expire and/or their successors are elected and qualified as hereinafter provided. The members of the Board of Governors shall be reimbursed for travel expenses as provided in the State Travel Reimbursement Act. The Board of Governors, at its discretion, may affiliate with the American Association of Dental Examiners as an active member and pay regular dues to said association and may send no more than two board members as delegates to regular meetings thereof.

Okla. Stat. tit. 59, § 328.8:

For the purpose of this act, the State of Oklahoma is divided into eight geographical districts, which districts shall be designated and shall comprise the following counties to wit:

District No. 1: Cimarron, Texas, Beaver, Harper, Woods, Alfalfa, Grant, Kay, Ellis, Woodward, Major, Garfield, Noble, Dewey, Blaine, Kingfisher and Logan.

District No. 2: Tulsa and Creek.

District No. 3: Roger Mills, Custer, Beckham, Washita, Harmon, Greer, Kiowa, Caddo, Jackson and Tillman.

District No. 4: Canadian, Grady, McClain, Comanche, Cotton, Stephens, Jefferson, Garvin, Murray, Carter and Love.

District No. 5: Oklahoma.

District No. 6: Lincoln, Cleveland, Pottawatomie, Seminole, Okfuskee, Hughes, Pontotoc, Coal, Johnston, Marshall and Bryan.

District No. 7: Mayes, Wagoner, Cherokee, Adair, Okmulgee, Muskogee, Sequoyah, McIntosh, Haskell, Pittsburgh, Latimer, LeFlore, Atoka, Pushmataha, Choctaw, and McCurtain.

District No. 8: Osage, Payne, Washington, Nowata, Craig, Ottawa, Rogers, Delaware and Pawnee.

Okla. Stat. tit. 59, § 328.9:

Nominations for dentist members of the Board of Governors from the several districts shall be by petition signed by at least ten members entitled to vote for such nominees. Nominations for the dental hygienist member of the Board of Governors shall be by petition signed by at least ten dental hygienists entitled to vote for such nominees. The election shall be by ballot. The ballots shall be mailed to those entitled to vote at least thirty (30) days prior to the date of canvassing the ballots and shall be returned by mail to the secretary and the ballots shall be opened and canvassed at a meeting of the board. In other

respects, the election shall be as the board may by rule direct. Only members of the organization residing the respective districts shall be entitled to vote for the dentist members therefrom. Only dental hygienists residing and licensed in the State of Oklahoma shall be entitled to vote for the dental hygienist member. Dentist members of the Board of Governors may be removed from office by special election called by the Board of Governors upon receipt of a written petition signed by at least twenty percent (20%) of the licensed dental hygienists residing in the State of Oklahoma. If a majority of the votes cast in the special election are in favor of recalling the board members, he/she will be removed from office as of the date of the results of the ballot canvassing are forwarded to the Board of Governors.

Okla. Stat. tit. 59, § 328.15:

The organization shall be governed by the Board of Governors which shall have the power and duties conferred in the State Dental Act. In addition thereto, the Board of Governors shall have the power and authority to promulgate rules and regulations to carry out the provisions of the State Dental Act as it deems necessary and proper to protect the dental health of the public. Further, the Board of Governors shall be charged with:

1. The executive functions of the organization; and

2. Examinations of all candidates; and

3. Enforcement of the provisions of the State Dental Act; and

4. The inspection of dental offices and dental laboratories; and

5. The establishment of minimum standards of dental care by cooperating with the Office of Public Affairs and other state and federal departments, who maintain dental facilities or offer dental care to persons in the various state

and federal institutions. The Board may enter into cooperative contracts or agreements with another state or combination of states for purposes of formulating and conducting regional simultaneous examinations, such as the Central Regional Dental Testing Service, Inc., or successor entity or comparable entities. The Board of Governors, on or before October 1 of each year, shall establish or set, within limits prescribed in the State Dental Act, all fees to be collected pursuant to the State Dental Act.

Okla. Stat. tit. 59, § 328.21, provides in part:

No person, unless currently registered to practice dentistry or dental hygiene in this state at the effective date of this act, shall begin the practice of dentistry of dental hygiene for himself, a dentist, any institution or individual without first applying for and obtaining a license from the Board of Governors, if the applicant is to practice dentistry, or a certificate of ability, if the applicant is to practice dental hygiene. . .

Okla. Stat. tit. 59, § 328.32, provides in part:

The Board of Governors shall have power, after a hearing for any causes now existing in the laws of the State of Oklahoma, or for a violation of any acts prohibited herein, to revoke a license of a dentist to practice dentistry, or a specialist license of a dentist, or to suspend the use of the same, or to discipline by probation or reprimand, public or private; and the Board of Governors shall have power to pass upon all petitions for reinstatement. . .

STATEMENT OF THE CASE

Petitioner Paul Plowman, a licensed dentist and a member of the Registered Dentists of the State of Oklahoma, brought his action against the Respondent members of the Oklahoma Board of Governors of Registered Dentists (hereinafter "Board") challenging the manner in which the dentists members are selected. *Plowman v. Massad*, 61 F.3d 796, 797 (10th Cir. 1995).

Section 328.8[1] of the Oklahoma Dental Act provides that the eight dentist members on the Board are elected by eight geographical districts created by the Act. Licensed dentists of each district elect one licensed dentist from that district to serve on the Board. The Act also provides that one dental hygienist Board member is elected by licensed hygienists throughout the state, and the two unlicensed Board members are appointed by the Governor of the State of Oklahoma.

In his Complaint, Petitioner alleged that the method for electing the eight dentist members to the Board set forth in the Oklahoma Dental Act violated his right to equal protection of the law. The eight districts have the following number of dentists residing therein:

District 1 - 128 dentists
District 2 - 367 dentists
District 3 - 57 dentists
District 4 - 160 dentists
District 5 - 515 dentists
District 6 - 164 dentists
District 7 - 158 dentists
District 8 - 120 dentists

Id. at 797. Petitioner contended that dentists in the more heavily populated districts, such as the one for Oklahoma County in which he resides, are afforded less representation on the Board. He noted that while 515 licensed dentists in Oklahoma County are entitled to select one Board member, licensed dentists in less populated districts are afforded the same right to select a Board member. *Id.* at 797. Petitioner contended that he was denied equal protection of law because his vote was "diluted" and did not "count" as much as the vote of a dentist member residing in a district having fewer dentists members residing therein, relying on the "one person, one vote" rule set forth in *Reynolds v. Sims*, 377 U.S. 533 (1964), *reh'g denied*, 379 U.S. 870 (1964). The Petitioner sought a declaratory judgment that

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[1]Okla. Stat. tit. 59, § 328.8.

the statutes creating the Board are unconstitutional, and therefore, the Board itself is unconstitutional. *Id.* at 797.

The Petitioner and the Board members all moved for summary judgment. The district court denied Petitioner's motion, while granting the Board members' motion, and entered judgment in favor of the Board members. The district court found that the Board "functions as a special purpose unit of government" and was therefore not subject to the "one person, one vote" rule. *Id.* at 797. Petitioner appealed that judgment to the Tenth Circuit Court of Appeals.

On July 31, 1995, the Tenth Circuit affirmed the judgment in favor of the Board members. The court relied primarily on *Sullivan v. Alabama State Bar*, 295 F.Supp. 1216 (M.D.Ala.), *aff'd without opinion*, 394 U.S. 812 (1969) in affirming the decision by the district court, quoting language which read, "[w]e hold that the constitutional principle of "one man, one vote" has no relevancy to the Board of Commissioners of the Alabama State Bar. *Id.* at 798. The Tenth Circuit stated:

> On the basis of *Sullivan*, we affirm the judgment of the district court in the instant case. The instant case is, in our view, on all fours with *Sullivan*. The Board of Governors of the Registered Dentists of Oklahoma is in the same position as the Board of Commissioners of the Alabama State Bar in *Sullivan*.

Id. at 799. It is from this opinion that the Petitioner now seeks a Writ of Certiorari from this Court.

SUMMARY OF ARGUMENT

The principle of "one person, one vote" pronounced in *Reynolds v. Sims* is not applicable to the present case. That principle applies to general popular elections and to

government entities which exercise general or important government powers. Here, the Board in question is a special purpose unit of state government which is not chosen by a general popular election. The Board does not possess any general or important powers of government that would affect a large number of citizens. Instead, this Board only has the limited power to license and regulate registered dentists, dental hygienists, dental assistants, dental nurses and dental laboratory technicians practicing their profession or trade in the State of Oklahoma. It is an administrative board that does not carry out legislature functions in the classical sense. Therefore, the "one person, one vote" rule does not apply to the election of the dentist Board members.

As this case does not implicate the fundamental right of a citizen to vote, and does not invoke a suspect classification, strict or heightened scrutiny is not the proper standard of review. Only the rational basis test may be applied. Given that the statute creating the districts from which the dentist Board members are elected is presumed to be constitutional, and given that Petitioner has failed to negate every conceivable reason for supporting the manner in which the eight districts are drawn, Petitioner's contention that it violates the Equal Protection clause of the Fourteenth Amendment is without merit.

ARGUMENT

I. THE "ONE PERSON, ONE VOTE" DOCTRINE DOES NOT APPLY TO A SPECIAL PURPOSE UNIT OF GOVERNMENT, SUCH AS THE BOARD OF GOVERNORS OF REGISTERED DENTISTS OF OKLAHOMA.

Petitioner argues that the statement by the Tenth Circuit that the "one person, one vote" rule of *Reynolds* is "irrelevant" to special purpose government entities is "contrary to the applicable decisions of this Court."[2] As set

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[2]*See*, Petition for Writ of Certiorari, p. 11.

forth below, the Tenth Circuit was correct in reaching that conclusion.

In *Reynolds*, this Court held that the Equal Protection Clause of the Fourteenth Amendment requires that seats in both houses of a bicameral state legislature must be apportioned on the basis of population. *Reynolds v. Sims, supra,* 377 U.S. at 586-587. The reasoning of *Reynolds* has been extended to units of local government exercising general governmental functions. In *Board of Estimate v. Morris*, 489 U.S. 688, 692-93 (1989), this Court stated, "state and local elections are subject to the general rule of population equality between electoral districts." That decision involved local government apportionment and a board that had general powers "common to municipal governments," including calculating sewer and water rates, tax abatements, and property taxes on urban development projects, managing all city property, and exercising plenary zoning authority. *Id.* at 695.

In *Hadley v. Junior College District*, 397 U.S. 50, 53-54 (1970), the Board of Trustees of the Junior College District possessed broad powers that comprised important governmental functions:

> Appellants argue that since the trustees can levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school districts, acquire property by condemnation, and in general manage the operations of the junior college, their powers are equivalent, for apportionment purposes, to those exercised by the county commissioners in *Avery*.[3] We feel that these powers, while not

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[3] *Avery v. Midland County*, 390 U.S. 474 (1968).

> fully as broad as those of the Midland County Commissioners, certainly show that the trustees perform important governmental functions within the districts, and we think these powers are general enough and have sufficient impact throughout the district to justify the conclusion that the principle which we applied in Avery should also be applied here.

Further, these trustees were elected by a general popular election:

> . . .whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials.

Id. at 56. Therefore, the election of the members of the Board of Trustees was subject to the "one person, one vote" doctrine.

However, in instances in which governmental officials are selected by means other than a popular election, *Reynolds* is inapplicable. This Court first clarified the distinction between selection by general popular election and selection by other means in *Sailors v. Board of Education*,

387 U.S. 105 (1967). There, a group of Michigan voters challenged the selection of a county board of education as violating the "one person, one vote" principle. However, the county board in that case was not selected by means of a general popular election. Instead, each local school board in the county sent a delegate to a biennial meeting and, at that meeting, the local delegates elected members to the county board. *Id.* at 106-107.

Justice Douglas found this distinction dispositive. He found that since the "electorate under the Michigan system is composed not of the people of the county but of the delegates from local school boards," the Michigan system was "basically appointive rather than elective." *Id.* at 109. He concluded "since the choice of members of the county school board did not involve an election, and since none was required for these nonlegislative offices, **the principle of one man, one vote has no relevancy.**" *Id.* at 111. (Emphasis added).

Subsequent opinions by this Court have focused on the scope and nature of the powers of a governmental entity, as discussed in *Hadley* to determine whether the governmental entity possesses general or normal governmental powers, thus subjecting it to the "one person, one vote" rule. In *Ball v. James*, 451 U.S. 355 (1981), this Court reviewed a case involving registered voters living within the boundaries of a large water reclamation district who did not meet the land ownership requirements necessary to entitle them to elect the district's directors. These individuals claimed that the state statute in question violated their equal protection rights. The question presented to this Court was whether the "peculiarly narrow function of this local governmental body and the special relationship of one class of citizens to that body releases it from the strict demands of the one-person, one-vote principle of the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 357.

In concluding that the *Reynolds* doctrine did not apply, this Court stated:

> First, the District simply does not exercise the sort of governmental powers that invoke the strict demands of *Reynolds*. The District cannot impose ad valorem property taxes or sales taxes. It cannot enact any laws governing the conduct of citizens, nor does it administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services.

Id. at 366. This Court also found that the functions of the district were relatively narrow, as the district did not own, sell, or buy water, and did not control the use of water which it delivered. Nor could the district "control the use to which the landowners who are entitled to the water choose to put it." *Id.* at 367, 368. This Court found that the provision of electricity "is not a traditional element of governmental sovereignty. . . and so is not in itself the sort of general or important governmental function that would make the government provider subject to the doctrine of the *Reynolds* case." (Citation omitted). *Id.* at 368. Review these factors, this Court concluded that, "[t]he functions of the Salt River District are therefore of the narrow, special sort which justifies a departure from the popular-election requirement of the *Reynolds* case." *Id.* at 370.

In *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), this Court reviewed the extent of the powers of a water district which might justify a departure from the *Reynolds* doctrine, where certain individuals residing within could not vote in water district elections, and further, the votes in those elections were apportioned according to the assessed value of the voter's land. This Court held:

> We conclude that the appellee water storage district, by reason of its special limited purpose and of the

> disproportionate effect of its activities on landowners as a group, is the sort of exception to the rule laid down in *Reynolds* which the quoted language from *Hadley, supra,* and the decision in *Avery, supra,* contemplated.

Id. at 728. In reaching this conclusion, this Court stated:

> The appellee district in this case, although vested with some typical governmental powers, has relatively limited authority. Its primary purpose, indeed the reason for its existence, is to provide for the acquisition, storage, and distribution of water for farming in the Tulare Lake Basin. It provides no other general public services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body. There are no towns, shops, hospitals, or other facilities designed to improve the quality of life within the district boundaries, and it does not have a fire department, police, buses, or trains.

Id. at 728-729. This Court stated that the district did not "exercise what might be thought of as 'normal governmental' authority," and its actions "disproportionately affect[ed]" the landowners. *Id.* at 729. Therefore, the *Reynolds* doctrine did not apply.

Other courts have further recognized the distinction between government entities possessing general government powers and those possessing limited government powers, for purposes of applying the *Reynolds* doctrine. In

Rosenthal v. Board of Education, 385 F.Supp. 223 (E.D. N.Y. 1975), *aff'd* 420 U.S. 985 (1975), the court rejected a "one person, one vote" challenge to a central school board whose members, like the members of the county board in *Sailors*, were selected by local boards. The *Rosenthal* court stated, "the emphasis we put on popular election as a test echoes the Supreme Court's recognition that the crucial factor in the application of Fourteenth Amendment considerations to any apportionment scheme is that the officials whose election is challenged must have been elected by popular vote." *Id.* at 227.

In *Benner v. Oswald*, 592 F.2d 174 (3rd Cir.) *cert. denied*, 444 U.S. 832 (1979), the Third Circuit Court of Appeals rejected a challenge to the manner of selecting the Board of Trustees of Pennsylvania State University. There, a group of undergraduates asserted, *inter alia*, that the procedure for selecting trustees violated their rights under the equal protection clause because it excluded them from voting. Examining the *Reynolds* line of cases, the *Benner* court found that "the cases involve general governmental elections." *Id.* at 182. To the *Benner* court, that fact distinguished the *Reynolds* cases from the allegations of the Penn State undergraduates. It wrote "we refuse to accept the formulation of the student appellants that the right to vote for University trustee is equivalent to a right to vote in a participatory democracy. We will not conclude that the University trustee selection process is a general public election or that the trustees perform governmental functions." *Id.* at 182-83.

Sailors and cases following it are applicable to the case at bar. Here, just as in those cases and unlike the cases relied on by Petitioner, no general or popular election is involved in selecting members of the Board. Section 328.8 of the Oklahoma Dental Act provides that the Board members are to be selected by 1) only licensed dentists, with respect to the eight dentists on the Board, 2) only licensed hygienists, with respect to the one hygienist on the Board, and 3) the Governor of the State of Oklahoma, with respect to the two unlicensed Board members. The

Oklahoma Dental Act establishes an organization of registered dentists of the State of Oklahoma, divides it into eight districts, and authorizes the dentists in each district to elect a dentist member of the Dental Board. Clearly, this appointment/selection process bears no resemblance to a general popular election as contemplated in *Reynolds* and its progeny. As the Board is not chosen by a general popular election, the "one person, one vote" rule is not invoked.

Petitioner contends that the Tenth Circuit did not "explain its reasoning nor identify the factual predicate" for finding that the Board is a "special purpose entity." However, the record, as well as state law creating the Board and defining its functions and scope of authority, reflects that the authority of the Board reaches no further than the dentists, dental hygienists, dental assistants, dental nurses and dental laboratory technicians who practice their profession or trade in the State of Oklahoma. Nothing in the record establishes that the Board possesses the power to regulate general public services. Neither the underlying record nor state law would show that the Board's powers affect or provide for schools, housing, transportation, utilities, roads, sanitation. Nor does the Board have any authority to assess or collect taxes, issue bonds, annex land or acquire property by condemnation proceedings or anything else which would ordinarily be financed by a municipal body. The function of the Board, by statute, is to ensure that competent dentists, dental hygienists, dental assistants, dental nurses and dental laboratory technicians are permitted to provide dental services to the public, but the Board possesses no powers beyond these individuals that would control the conduct of the public at large. Because this Board does not possess general or important powers of government authority, the election of its dentist members is not subject to the *Reynolds* doctrine.

Petitioner cites *Lockport v. Citizens for Community Action at Local Level, Inc.*, 430 U.S. 259 (1977) and *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970) in support of his argument that the "one person, one vote" rule should have been applied in the present case. *Lockport* involved a

referendum election by separate majorities of voters who lived in the cities within the county, and of those voters who lived outside the cities to approve a new county charter. *Lockport v. Citizens for Community Action at Local Level, Inc., supra,* 430 U.S. at 260. Because the statute in question provided for a general election of a charter which would have affected all citizens within the county, the "one person, one vote" rule applied. The issue presented in *Phoenix* was whether the Federal Constitution permitted a state to restrict the right to vote in elections to approve the issuance of general obligation bonds to real property owners only. *Phoenix v. Kolodziejski, supra,* 399 U.S. at 205. In deciding that the "one person, one vote" rule applied, this Court concluded that all residents of the City of Phoenix, both property and nonproperty owners alike had, "a substantial interest in the public facilities and the services available in the city and will be substantially affected by the ultimate outcome of the bond election at issue in this case." *Id.* at 209. Both opinions are inapplicable to the present case, as they involved general popular elections in which all citizens had a substantial interest in the results of the elections.

Petitioner claims that Tenth Circuit's holding that "one-person, one-vote" is "irrelevant" is in conflict with *Quinn v. Millsap*, 491 U.S. 95 (1989), "which expressly rejected the conclusion 'that the Equal Protection Clause was irrelevant' to a special purpose or limited function governmental entity."[4] However, the Tenth Circuit did not hold that the Equal Protection Clause is irrelevant, nor does the opinion reflect that. Rather, it is the **"one person, one vote"** principle that was held to be irrelevant, as set forth in *Sullivan* and by this Court in *Sailors*.

The *Quinn* decision involved a proclamation by the Missouri Supreme Court that the Equal Protection Clause was irrelevant in regard to a provision in the Constitution of the State of Missouri which provided that the governments of the city of St. Louis and St. Louis County could be

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[4]*See*, Petition for Writ of Certiorari, p. 11.

reorganized by a vote of the electorate of the city and county "upon a plan of reorganization drafted by a 'board of freeholders.'" *Id.* at 96. The appellants in that case contended that the Equal Protection Clause of the Fourteenth Amendment was violated because the provision in question required that every member of the official board own real property. *Id.* at 96. This Court, in following prior cases involving land-ownership requirements, found that the Missouri Constitutional provision was unconstitutional, as follows:

> In sum, we cannot agree with appellees that under the Equal Protection Clause, as previously construed by this Court, land-owners alone my be eligible for appointment to a body empowered to propose a wholesale revision of local government. "Whatever objectives" Missouri may wish "to obtain by [a] 'freeholder' requirement must be secured, in this instance at least, by means more finely tailored to achieve the desired goal." *Turner*, 396 U.S. at 364, 24 L.Ed.2d 567, 90 S.Ct. 532.[5] Accordingly, a land-ownership requirements is unconstitutional here, just as it was in *Turner* and *Chappelle*.[6]

Id. at 109.

The present case does not present a "land-ownership" requirement for membership on the Board in question. Nor does it involve a board who's work "affects all citizens of the city and county. . ." as was the case with the board in

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[5]*Turner v. Fouche*, 396 U.S. 346 (1970).

[6]*Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977).

Quinn. Nor did the Tenth Circuit in the present case hold that the Equal Protection Clause is irrelevant, as did the Missouri Supreme Court. The opinion by the Tenth Circuit is not in conflict with the *Quinn* decision.

The Tenth Circuit was not incorrect in relying on authority holding that the "one person, one vote" rule is "irrelevant" to the election of a special purpose government board. The term "irrelevant" was adopted from this Court's opinion in *Sailors*, where this Court held that "one person, one vote" rule had "no relevancy" to the election of a county school board that did not involve an election. *Sailors v. Board of Education, supra*, 387 U.S. at 111. The use in this case of the term "irrelevant" as applied to the *Reynolds* doctrine is appropriate, as the "one person, one vote" rule is, in fact, irrelevant.

This Court has established factors to analyze the functions of a government entity to determine whether it performs general or important governmental functions which would invoke the "one person, one vote" requirement, as set forth in *Hadley*, *Ball* and *Salyer*. Petitioner contends that this case presents an unsettled question of law with broad implications that should now be addressed by this Court. Yet, the opinion by the Tenth Circuit does not conflict with this Court's prior pronouncements. Nor does it conflict with decisions by other courts of appeals. The conclusion reached by the Tenth Circuit is inescapable, given that the Board is not elected by a popular election and does not possess traditional government powers that would invoke the *Reynolds* doctrine. As Petitioner has failed to demonstrate a conflict between the Tenth Circuit and this Court, or between the Tenth Circuit and other courts of appeals, the requested writ of certiorari must be denied.

II. STRICT OR HEIGHTENED SCRUTINY IS NOT APPLICABLE IN THIS CASE.

Petitioner has failed to identify the existence of any fundamental right other than the "one person, one vote" rule, which is not applicable in the first instance, and does

not contend he is a member of a suspect classification which might justify a strict or heightened scrutiny analysis of Section 328.8 of the Oklahoma Dental Act.

> In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

FCC v. Beach Communications, Inc., 113 S.Ct. 2096, 2101 (1993). Therefore, the Tenth Circuit properly did not engage either a strict or heightened scrutiny analysis of the manner in which the dentist Board members are elected.

In support of his argument that a strict or heightened scrutiny analysis should have been applied to Section 328.8, Petitioner cites *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969). Both cases involve general public elections, unlike the selection mechanism for choosing the members of the Board. The *Anderson* decision involved an Ohio statute which required an independent candidate for the office of President of the United States to file a statement of candidacy and nominating petition in March in order to appear on the general election ballot in November. *Anderson v. Celebrezze, supra*, 460 U.S. at 783. This Court held that the early filing deadline placed an unconstitutional burden on both associational rights of the candidate's supporters and placed "a significant state-imposed restriction on a nationwide electoral process." *Id.* at 795. Yet, the heightened level of scrutiny in the *Anderson* opinion is not applicable to the present case. The selection of the dentist Board members is, unlike the election of the President of the United States, not accomplished by a general election.

The *Kramer* decision also involved a general public election process that permitted some citizens to vote, while excluding others, thereby triggering a strict scrutiny analysis of the state statute providing for that election process. The statute required, for purposes of eligibility to vote in certain school district elections, either the ownership or lease of taxable real property within the district or parenthood or custody of children enrolled in the local public schools. *Kramer v. Union Free School Dist., supra,* 395 U.S. at 622. This Court applied the strict scrutiny standard in its review precisely because a general popular election for school board members was provided for by statute, but certain classes of citizens were excluded from voting in that election. *Id.* at 628-629. As the present case does not involve a general popular election for members of the Board, the rationale underlying the *Kramer* decision has no bearing on this case.

Petitioner's assertion that strict scrutiny or heightened scrutiny should have been used in analyzing the constitutionality of Section 328.8 is without merit. The cases cited by Petitioner in support of his proposition pertain to the constitutional rights of citizens voting in a popular general election, and not to the selection of members of a special purpose unit of government.

III. PETITIONER HAS NOT ESTABLISHED THAT NO RATIONAL BASIS EXISTS FOR THE MANNER IN WHICH THE EIGHT GEOGRAPHIC DISTRICTS UNDER SECTION 328.8 ARE DRAWN.

The selection of dentist Board members from different designated geographic districts as provided by the Oklahoma Dental Act is not irrational, and in any event, the Petitioner failed to meet his burden to eliminate all arguments that would negate a finding of rationality.

The Oklahoma Dental Act does not contain any legislative text that would explain the reasoning behind the manner in which the geographic districts in question are

drawn. However, there exists a presumption of the constitutionality of Section 328.8 which the Petitioner failed to overcome:

> On rational-basis review, a classification in a statute such as the Cable Act comes to us bearing a strong presumption of validity, see *Lyng v. Automobile Workers*, 485 U.S. 360, 370, 99 L.Ed.2d 380, 108 S.Ct. 1184 (1988), and those attacking the rationality of the legislative classification have the burden "to negative every conceivable basis which might support it," *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 35 L.Ed.2d 351, 93 S.Ct. 1001 (1978) (internal quotation marks omitted). See also *Hodel v. Indiana*, 452 U.S. 314, 331-332, 101 S.Ct. 2376, 2387, 69 L.Ed.2d 40 (1981).

FCC. v. Beach Communications, Inc., supra, 113 S.Ct. at 2101-2102. This Court further stated:

> Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. *United States Railroad Retirement Bd. v. Fritz, supra*, 449 U.S., at 179, 101 S.Ct., at 461. See *Flemming v. Nestor*, 363 U.S. 603, 612, 80 S.Ct. 1367, 1373, 4 L.Ed.2d 1435 (1960). Thus, the absence of "legislative facts" explaining the distinction "[o]n the record," 294 U.S.App.D.C., at

> 389, 959 F.2d, at 987, has no significance in rational-basis analysis. See *Nordlinger v. Hahn*, 505 U.S. _, ___, 112 S.Ct. 2326, 2334, 120 L.Ed.2d 1 (1992) (equal protection "does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification"). In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data. See *Vance v. Bradley, supra*, 440 U.S., at 111, 99 S.Ct., at 949. See also *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 101 S.Ct. 715, 723, 66 L.Ed.2d 659 (1981). "'Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.'" *Lehnhausen, supra*, 410 U.S., at 365, 93 S.Ct., at 1006 (quoting *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 510, 57 S.Ct. 868, 872, 81 L.Ed. 1245 (1987).

Id. at 2102. Further, a classification does not fail rational basis review because it "is not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), *reh'g denied*, 398 U.S. 914 (1970). (Citation omitted).

While the burden rested with the Petitioner to address and negate all conceivable reasons for the way in which the

eight districts under Section 328.8 are drawn, he failed to adequately do so. The Board members do not have to set forth justifications for the districts, as the Court itself may suggest its own purposes that may support the classification in order to uphold the constitutionality of the statute. *Sklar v. Byrne*, 727 F.2d 633, 641 (7th Cir. 1984).

Petitioner complains that the present manner in which the eight regions are drawn violates his equal protection rights. His argument is predicated on the notion that the Board is created solely for the benefit of registered dentists throughout Oklahoma, and that his vote has been diluted. Yet, the primary and stated purpose of the Oklahoma Dental Act is to protect public health and ensure public safety where dentistry is practiced, and accomplishes these goals by the regulation of registered dentists. The purpose of the Oklahoma State Dental Act, which creates the Board in question, readsin part as follows:

> The practice of dentistry in the State of Oklahoma is hereby declared to affect the public health, safety and general welfare and to be subject to regulation and control in the public's best interest. It is further declared to be a matter of public interest and concern that the dental profession, through advancement and achievement, merits and receives the confidence of the public and that only properly qualified dentists be permitted to practice dentistry and supervise dental assistants and/or dental nurses in the State of Oklahoma.

Okla. Stat. tit. 59, § 328.2. The Board is charged by statute to carry out the provisions of the Oklahoma Dental Act and protect "the dental health of the public." Okla. Stat. tit. 59, § 328.15. While the Board's activities and statutory duties involve the licensing and regulation of

dentists such as Petitioner, it was not created solely for dentists' benefit. Thus, the focus on the conceivable reasons for the manner in which the eight districts are drawn shifts from the interests of the dentists to the interest of the public.

This stated objective of the Oklahoma Dental Act applies to the public statewide, and not just to the public residing in urban areas. An application of the "one person, one vote" rule would effectively give the metropolitan dentists a greater, if not majority voice on the Board. This in turn would make it less likely that dentist practicing in diverse rural regions would have any input into Board decisions. The Board would likely become diluted with members practicing in one or two concentrated urban areas, to the exclusion of members from other regions of the State.

As this Board is statutorily charged with regulating the practice of dentistry statewide, it is conceivable that the legislature, in drawing the districts the way it did, wanted to ensure that the Board represented a cross section of the State, and not the majority of dentists who chose to practice in only one or two concentrated urban areas. Because the regulations and policies governing the practice of dentistry apply statewide, the legislature may have wanted to ensure that dentists from diverse regions of the state, and not just urban localities, would have input into the formulation of policies and regulations that apply to dentists statewide. Perhaps the legislature felt that it is advantageous to have Board members familiar with members of the public in diverse regions of the state, and familiar with the nature of practicing dentistry in such regions. The present election mechanism under Section 328.8 lessens the chance of one or several geographically isolated groups of dentists controlling the formulation of statewide dental policies and regulations.

As the Board also carries out disciplinary functions pursuant to Section 328.32 of the Oklahoma Dental Act, the legislature could have believed that the Board would better

carry out this function without bias or prejudice on the part of the Board members, where most, if not all of the Board members were from different regions and hence not in direct competition with the dentist subject to such proceedings. The legislature could have believed that eliminating bias and prejudice arising from competition between Board members and those who are subject to disciplinary proceedings favors both the interests of the dentists and the interest of the public.

Perhaps the legislature believed that should urban localities become saturated with dentists, such saturation would encourage a Board composed of a majority of urban dentists to restrict the number of licenses issued to lessen competition, to the detriment of rural regions that might be in need of additional dentists.[7] Such competition between a majority of Board members practicing in the same urban localities would not be in the best interest of the public, and would provide a rational basis for supporting Section 328.8.

The Oklahoma Legislature chose to provide for a limited election process among dentists and dental hygienists, in conjunction with two at-large appointments by the governor to select Board members. The legislature created separate regions from which the dentist Board members are elected to ensure that the Board is not controlled by only one or several geographically concentrated groups of dentists. The legislature could have easily let the governor of the State of Oklahoma merely appoint all of the Board members, but chose this innovative method instead. As the statute in question is presumed to be rational, it is not the province of the courts to second-guess the reasoning the Oklahoma Legislature employed in defining the eight regions. Petitioner carried the burden of negating every conceivable basis which may support Section 328.8 but failed to do so. Therefore, the decision by the

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[7]Licensing power is vested in the Board pursuant to Okla. Stat. tit. 59, § 328.21.

Tenth Circuit upholding the constitutionality of Section 328.8 was proper.

IV. THE TENTH CIRCUIT DID NOT IMPROPERLY EXPAND THE APPLICATION OF *SULLIVAN V. ALABAMA STATE BAR.*

Petitioner asserts that the Tenth Circuit "improperly expanded the application of *Sullivan v. Alabama State Bar*," by "ignor[ing] the applicable decisions of this Court regarding the proper effect of summary affirmances."[8] First, the Tenth Circuit provided a detailed analysis of the effect of a summary affirmance in Footnote No. 1 of its opinion. In citing *Anderson v. Celebrezze*, *supra*, 460 U.S. 780, the Tenth Circuit noted that this Court stated "[w]e have often recognized that the precedential effect of a summary affirmance extends no further than 'the precise issues presented and necessarily decided by those actions.'" The Tenth Circuit determined that the "precise issue" in the *Sullivan* decision, was whether the one person, one vote rule applied to the Board of Commissioners of the Alabama State Bar." *Plowman v. Massad, supra,* 61 F.3d at 799. A review of the opinion by the Tenth Circuit would show that it did not ignore "the applicable decisions of this Court regarding the proper effect of summary affirmances." Rather, the court noted the limited nature of the precedential effect of such affirmances, but chose to adopt the rationale set forth in *Sullivan*.

Petitioner has failed to produce any authority which would have prevented the Tenth Circuit from citing a district court case with approval, and quoting language contained therein. The *Sullivan* decision has not been reversed. The rationale contained therein conforms with this Court's prior decisions regarding the inapplicability of the *Reynolds* doctrine to special purpose units of government. The Tenth Circuit was free to cite the *Sullivan* decision and to analogize it with the facts and issues presented in this case.

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[8]See, Petition for Writ of Certiorari, p. 14.

As noted by the Tenth Circuit, the *Sullivan* decision was "on all fours" with the present case. *Sullivan* involved a lawyer who sought a restraining order and an injunction against the prosecution or consideration of contempt proceedings against him by the Board of Commissioners of the Alabama State Bar. *Sullivan v. Alabama State Bar, supra,* 295 F.Supp. at 295. The plaintiff claimed that his Equal Protection Rights were violated because of "malapportionment of the Board of Commissioners arising from the wide disparity in population and in numbers of lawyers in the various State judicial circuits." *Id.* at 1219.

The members of the Board of Commissioners were chosen as follows:

> The Board of Commissioners of the Alabama State Bar was first established in 1923. The members in good standing of the Alabama State Bar in each judicial circuit of the State select one member of said Board of Commissioners. Thus, there are 36 State judicial circuits and 36 members of the Board of Commissioners. There are wide variances among the judicial circuits both in total population and in the number of licensed lawyers.

Id. at 1216. In determining that the "one person, one vote" rule did not apply to the Board of Commissioners, the court, relying in part on the *Sailors* decision, stated:

> The Supreme Court has held that the "one man, one vote" principle has no relevancy to the choice of members of a county school board, a non-legislative office. Lower courts have reached the same result as to various governing bodies of limited-purpose districts and as to members of the

> executive or judicial branch. As has been indicated, the powers of the Board of Commissioners here under attack may more accurately be classed as judicial than as legislative. . . . We hold that the constitutional principle of "one man, one vote" has no relevancy to the Board of Commissioners of the Alabama State Bar.

Id. at 1221.

In the present case, as in *Sullivan*, an apportionment challenge was mounted by a plaintiff against a special or limited purpose unit of government. The Tenth Circuit was not in error in analogizing the *Sullivan* decision with the present action, as the question it presented is nearly identical with that presented by this case.

Petitioner claims that the powers of the Alabama State Bar in *Sullivan* were classified as "judicial" in nature, while the Board in this case carries out "broad administrative functions which encompass legislative and executive duties such as the making and enforcement of rules and the assessment, collection and expenditure of revenues."[9] As such, he claims that these facts distinguish the holding in *Sullivan* from the present case. Yet, a review of that opinion would show that the Alabama State Bar possessed powers beyond mere adjudicatory functions, as the district court noted, "[b]road powers and authority are conferred on the Board of Commissioners, including the following: . . . (c) subject to the approval of the supreme court, to formulate rules governing the conduct of all persons admitted to practice. . ." *Id.* at 1216. Such authority would constitute administrative rule-making, as is the case

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[9]*See*, Petition for Writ of Certiorari, p. 14. Of course, the Board in this case does possess adjudicatory powers in regard to the discipline of dentists, as provided for by Okla. Stat. tit. 59, § 328.32.

the governmental entity in *Sullivan* possessed more than mere adjudicatory powers, but the plaintiff in that case chose only to challenge the judicial or adjudicative powers of that entity.

Regardless of Petitioner's attempt to distinguish the facts in *Sullivan*, a special purpose unit of government does not have to carry out only judicial functions to be exempt from the "one person, one vote" rule, as reflected by the nature of the governmental entities in *Ball* and *Salyer*. Petitioner's attempt to draw a distinction between a governmental entity that possesses only adjudicatory powers and one that carries out both administrative adjudicatory functions and administrative rule-making functions does not alter the analysis of whether such entity exercises general or important government powers. While Petitioner characterizes the functions of the present Board as "legislative and executive," such functions are in the context of administrative rule-making, and do not constitute classical legislative and executive functions which might invoke the *Reynolds* doctrine. Therefore, Petitioner's argument is without merit.

CONCLUSION

The Tenth Circuit opinion does not run afoul of the "one person, one vote" rule. The opinion is limited solely to the statutory authority which creates and confers limited powers upon this particular Board. The opinion does not affect the rights of voters in general elections, nor does it affect the rights of voters regarding general purpose units of governments that wield general or important governmental powers. The underlying case presented a special purpose unit of government with limited authority which governs only the practice of dentistry in Oklahoma. Its rules and regulations do not control the activities of the public at large, but only the professional activities of state licensed dentists and hygienists, and the activities of dental assistants, dental nurses and dental laboratory technicians. The selection mechanism set forth by the Oklahoma Dental Act to elect Board members does not contemplate a general

popular election. Rather, it contemplates an election of Board members by only licensed dentists and hygienists. Because the Board does not possess general or important government powers, and because the selection process of its members does not involve a general popular election, the election of the dentist Board members is not subject to the *Reynolds* doctrine.

The opinion by the Tenth Circuit does not constitute a deviation from precedent established by this Court. Nor does it conflict with decisions rendered by other courts of appeals. Therefore, the Respondent Board Members respectfully request that the Petition for Writ of Certiorari be denied, as the Petitioner has failed to establish adequate grounds in support of his requested relief.

Respectfully submitted this 27th day of November, 1995.

W. CRAIG SUTTER
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR RESPONDENTS

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

PAUL PLOWMAN, D.D.S.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. CIV-93-1008-C
	)	
JOSEPH J. MASSAD, JAMES LIMESTALL, FRED LUCAS, ED GARRETT, JAMES FARLEY, BRAD HOOPES, L.D. WHITLOCK, WILLIAM SMITH, BONNIE FLANIGAN, BEULAH HOUSTON-VERNON, and DARLA SHURTZ, individually and in their official capacities, and their successors,	)	(Filed Apr. 25, 1994)
	)	
Defendants.	)	

JUDGMENT

Upon consideration of the pleadings herein, the Court finds that defendants' Motion for Summary Judgment should be granted, and judgment is therefore entered on behalf of all defendants.

DATED this 25 day of April, 1994.

/s/ ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

PAUL PLOWMAN, D.D.S.,	)
	)
Plaintiff,	)
	)
v.	)**No. CIV-93-1008-C**
	)
JOSEPH J. MASSAD, JAMES LIMESTALL, FRED LUCAS, ED GARRETT, JAMES FARLEY, BRAD HOOPES, L.D. WHITLOCK, WILLIAM SMITH, BONNIE FLANIGAN, BEULAH HOUSTON-VERNON, and DARLA SHURTZ, individually and in their official capacities, and their successors,	)**(Filed April 25, 1994)**
	)
Defendants.	)

ORDER

This matter is before the Court for consideration of the motion for summary judgment filed by defendants, the Oklahoma Board of Governors of Registered Dentists, individually and in their official capacities. Plaintiff has responded and also requests summary judgment. The parties agree the material facts are not in dispute.

Undisputed Facts

1. The Oklahoma Dental Act, 59 Okla. Stat. §§ 328.1, et seq., establishes an organization known as the

"Registered Dentists of Oklahoma." The Registered Dentists of Oklahoma consist of those individuals licensed to practice dentistry in Oklahoma. The Dental Act also establishes a governing body for this organization, "The Board of Governors of Registered Dentists of Oklahoma" ("Board").

2. The Board is composed of 11 members, of whom eight are dentists elected by the membership of the Registered Dentists of Oklahoma from eight geographic districts. The Board also includes one dental hygienist member, and two members who represent the public in general.

3. To be a candidate for election, a dentist must reside in the district and secure a nominating petition signed by at least ten other dentists residing in the district. Only dentists residing within the defined geographic district can vote for the Board representative from that district.

4. A Board member may be recalled pursuant to a recall petition signed by 20% of the dentists eligible to vote in that district. No grounds for recall are necessary and recall will be accomplished if a majority of dentists voting in the recall election approve that action.

5. The board is charge with the responsibility of examining candidates for licensure as dentists and as dental hygienists, enforcing the provisions of the Dental Act, and inspecting dental offices and dental laboratories. Other powers of the Board include the power to sue and be sued, to employ attorneys, to obtain Attorney General opinions, to hire inspectors and investigators, to enter into contracts, to acquire, hold, encumber and dispose of real and personal property, to pay travel expenses, to affiliate with professional organizations, to promulgate rules and regulations, to enforce the penal provisions of the Dental Act, to establish minimum standards of dental care, to enter into cooperative agreements with other agencies and other

states, to appoint committees and examining boards, to hire employees, to pay expenses, to establish continuing education requirements, to fix fees for examinations, permits, licenses and registration, to discipline dentists and hygienists, and to seek injunctions against the unlicensed practice of dentistry.

6. The provisions of the Dental Act impose limits on the Board exercise of its powers and responsibilities. The Dental Act defines the practice of dentistry and dental hygienists, and establishes rules of professional conduct for dentists and hygienists, and specifies the grounds for disciplinary action against dentists and dental hygienists. The Dental Act also establishes limits on the fees that the Board may establish for applications for licensure and for renewal of licensure. In addition, the Dental Act establishes procedures for disciplinary hearings against dentists and for appeals from a Board decision imposing discipline. The Board's decision to impose disciplinary actions may be appealed to Oklahoma County District Court and subsequently to the Oklahoma Supreme Court. In its sole discretion, the Board may enforce or not enforce any provision of the Dental Act. The Board is equally empowered to determine what punishment, if any, will be imposed for any violation. Punishment may include revocation or suspension of a dental license, probation, and public or private reprimand.

7. As an administrative agency, the Board is subject to certain provisions of the Administrative Procedures Act. 75 Okla. Stat. §§ 250, et seq.

8. Under the Administrative Procedures Act, the Board's rules must be submitted to the Governor, to the Speaker of the House of Representatives, and the President Pro Tempore of the Senate. The Board's rules are not valid and effective until approved by either the Governor or a Joint Resolution of the Legislature.

9. The Plaintiff is Dr. Paul Plowman, a licensed dentist and member of the Registered Dentists of Oklahoma.

10. Dr. Plowman lives and practices dentistry within Oklahoma County, Oklahoma, which is in the Board's District 5.

11. The numbers of licensed dentists in the eight districts are as follows: District 1 - 128, District 2 - 367, District 3 -57, District 4 - 160, District 5 - 515, District 6 - 164, District 7 - 158, and District 8 - 120.

12. Each of the eight districts elects one Board member regardless of the number of dentists eligible to vote within such districts.

Standard of Review

A party resisting a motion for summary judgment must do more than make conclusonary allegations, he "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P 56(e); Dart Industries, Inc. v. Plunkett Co., 704 F.2d 496, 498 (10th Cir. 1983); see Lake Hefner Open Space Alliance v. Dole, 871 F.2d 943, 946 (10th Cir. 1989)(plaintiff did not "by affidavits or ...otherwise...set forth specific facts showing that there is a genuine issue for trial."(emphasis supplied)). The mission of the summary judgment procedure is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)(quoting Advisory Committee Note to Fed.R.Civ.P. 56(e)). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party there is no 'genuine issue for trial'," and summary judgment can be granted. Id. at 587 (citation omitted). The burden on the non-moving party is only to point out that the records do not disclose a genuine issue on any material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). It is sufficient to discharge the moving party's

burden by showing the record does not contain a material issue and point out the part of the record supporting the assertion. Where, as here, the non-moving party has the burden of proving at trial the material issues, then the moving party is not required to "support its motion with affidavits or other similar materials negating the opponent's claim." Id. at 323. It is enough to show "that there is an absence of evidence to support the nonmoving party's case." Id. at 325.

There is no need for the submission of additional evidence or an evidentiary hearing as plaintiff has suggested because the material facts are not in dispute. Once the board, as the moving party, points out the absence of evidence to create a "genuine issue" of a "material fact" on which the non-moving party bears the burden of proof at trial, the Supreme Court imposes a burden on the non-moving party. Plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. The non-moving party must set forth specific facts showing there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Although the Court will construe the facts and inferences drawn from the record before it in the light favoring the non-movant, "[e]ven under this standard there are cases where the evidence is so weak that the case does not raise a genuine issue of fact." Burnette v. Dow Chemical Co., 849 F.2d 1269, 1273 (10th Cir. 1988). The question in a case for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-52.

Discussion

This action involves a constitutional challenge to the Board's election process, Under the Dental Act, 59 Okl. Stat. §§ 328.1, et seq., Oklahoma is divided into eight

geographical districts. 59 Okla. Stat. § 328.7. Some districts encompass as few as two counties. District One has the most and covers 17 counties. 59 Okla. Stat. § 328.8. Each district may elect one Board member. 59 Okla.. Stat. § 328.8. Plaintiff alleges the Board's election process violates the Fourteenth Amendment to the United States Constitution, which guarantees, among other things, each citizen is entitled to equal protection under the laws.

An important decision in the pertinent cases is whether an election is accomplished by general popular vote or by some other means. If the controversy concerns a governmental unit exercising general governmental functions, votes may only be cast based on an apportionment of the population. Reynolds v. Simms, 377 U.S. 533 (1963). Elections by other means have been upheld. Sailors v. Bd. of Educ. of Kent County, 387 U.S. 105 (1967)(local school board delegates elected the members of the county school board); Rosenthal v. Bd. of Educ. of Central High School Dist. No. 3 of Town of Hempstead, 385 F.Supp. 223 (E.D.N.Y. 1974) aff'd, 420 U.S. 985 (1975)(local board members elected the central school board members); Benner v. Oswald, 592 F.2d 174 (3d Cir.), cert denied, 444 U.S. 832 (1979)(election of a university's trustees).

In Hadley v. Junior College Dist. of Metropolitan Kansas City, Mo., 397 U.S. 50 (1970), the Supreme Court announced that the general principle of one man, one vote does not apply to special purpose units of government. Although the Board is a unit of government, the restrictions on its exercise of power clearly make it a special purpose unit, and thus, the apportionment requirement of the Reynolds line of cases is inapplicable here. The Board may determine the fee for a dental license and may regulate the practice of dentistry and dental hygiene. Although the Board is responsible for any disciplinary action against a licensed dentist, any such action by the Board is subject to review under the Administrative Procedures Act, 75 Okla.

Stat. §§ 250, et seq. This Court finds the Board's actions are sufficiently restricted by the provision of the Dental and Administrative Procedures Act that it functions as a special purpose unit of government. Accordingly, the fact that the Board is selected by a means other than a general election does not violate plaintiff's right to equal protection under the laws. The Board's motion for summary judgment will be granted and plaintiff's motion for summary judgment will be denied.

Conclusion

In accordance with the foregoing, the Board's motion for summary judgment is GRANTED, and the plaintiff's motion for summary judgment is DENIED. A judgment shall enter accordingly.

IT IS SO ORDERED this 25 day of April, 1994.

/s/ ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE